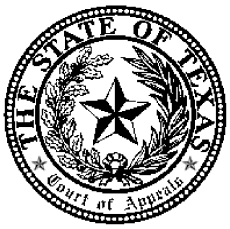
Affirmed as Modified and Opinion filed September 20, 2001.



In The

Fourteenth Court of Appeals

NO. 14-00-00629-CV

CLEMMIE WICKWARE, Appellant

V.

RICHARD THALER, ET AL., Appellee

On Appeal from the 278th District Court
Walker County, Texas
Trial Court Cause No. 20,713-C

O P I N I O N

Appellant, an inmate in the Texas Department of Criminal Justice--Institutional Division (TDCJ), acting *pro se* and proceeding *in forma pauperis*, appeals the dismissal of his civil rights lawsuit against Warden Richard Thaler and 42 other prison officials. In six points of error, appellant contends (1) the trial court abused its discretion by failing to hold a hearing on his request for temporary and permanent injunctive relief; (2) the trial court denied appellant's rights to due process and access to the courts by failing to hold a hearing on appellant's request for temporary and permanent injunctive relief; (3) the trial court abused its discretion in ordering him to pay court costs; (4) the trial court abused its

discretion by denying a continuance for appellant to prepare and file his affidavit relating to previous filings; (5) the trial court erred by failing to hold a "full and fair" video hearing on his complaints; and (6) the trial court erred by dismissing his complaint with prejudice. Finding the trial court erred in dismissing the suit "with prejudice," we affirm the judgment as modified to delete the words "with prejudice."

PROCEDURAL AND FACTUAL BACKGROUND

In his suit against TDCJ officials and employees, appellant alleged his civil rights had been violated under 42 U.S.C.A. § 1983, 29 U.S.C.A. § 794 (Rehabilitation Act), and 42 U.S.C.A. § 12131, *et seq.*, (Americans with Disabilities Act (ADA)). Appellant contends the prison medical personnel refused to properly treat his chronic back and leg condition. He stated that he has had problems for many years and is constantly subject to muscle spasms in his back and legs, and he is in great pain. He states that the prison medical personnel refused to furnish him with pain medication, muscle relaxants, and "Canadian Crutches." He filed several grievances with the prison officials, and all were returned without action. Essentially, the grievance complaints were answered by the prison officials indicating he had "good physical abilities," and that he required no special treatment. Thereafter, appellant filed several complaints alleging retaliation by prison officials for filing grievances.

Appellant filed suit seeking an injunction against the defendants compelling them to furnish him with proper medical treatment, return all his legal documents and property, and refrain from further interfering with his medical treatment and legal work. He also asked for money damages against several of the prison officials. Appellant attached his unsworn declaration of inability to pay costs with his petition, but did not file a separate affidavit relating to the previous filings of other suits as required by section 14.004, Texas Civil Practice and Remedies Code.

The trial court gave appellant written notice on February 28, 2000, that it would

conduct a hearing to determine whether there is an arguable basis, in fact and in law, for his complaints. On March 23, 2000, the trial court conducted the hearing pursuant to section 14.008 of the Civil Practice and Remedies Code. The hearing was held by teleconference, with the trial court in Walker County, appellant at the Hughes Unit in Gatesville, and an assistant attorney general in Austin. The State made an oral motion to dismiss appellant's suit on the grounds that appellant failed to comply with section 14.004 (Affidavit Relating to Previous Filings) of the Civil Practice and Remedies Code. The trial court signed a written order dismissing the suit on grounds that appellant failed to file a proper and complete affidavit relating to previous filings in violation of section 14.004. The trial court also ordered the clerk of the court not to accept for filing any other lawsuit filed by appellant until the bill of costs assessed against him has been paid in full, except as provided by statute.

Prior to the hearing, on February 28, 2000, the trial court sent appellant a bill of costs for $165.00, and ordered that payment be made out of appellant's inmate trust account pursuant to section 14.006 of the Civil Practice and Remedies Code. Pursuant to that statute, the order required only that appellant pay the lesser of 20% of his preceding six months' deposits in his trust account or the total costs. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 14.006(b) (Vernon 1986 & Supp. 2000). Thereafter, the order required that appellant pay 10% of his monthly deposits to his account until the total court costs were paid, or until appellant was released from confinement. TEX. CIV. PRAC. & REM. CODE ANN. § 14.006(c), (d) (Vernon 1986 & Supp. 2000). On March 24, 2000, one day after the hearing, appellant filed a certified copy of his inmate's trust account indicating no deposits in the preceding six months, and a current balance of $5.31.

The notices of hearing and assessment of costs were both dated February 28, 2000, and appellant filed his affidavit of previous filings on March 17, 2000, six days before the teleconference hearing.

FAILURE TO HOLD A HEARING

In points one, two, and five, appellant contends the trial court failed to hold a "full and fair" evidentiary hearing on his request for injunctive relief. Specifically, he asserts that he requested a preliminary injunction, or "T.R.O.," to enjoin the defendants from taking his property and legal work and to compel the return of legal papers they had already taken. In point one, appellant contends the trial court abused its discretion by refusing to hear his complaints In point two, he contends the failure to grant a hearing has denied him of "fundamental due process." In point five, he further contends the trial court denied him a "full and fair video evidentiary hearing" and "unjustly found" appellant's complaints "frivolous" without addressing the merits of any of his This cause was heard on the transcript of the record of the court below. The record indicates that the appeal should be **DISMISSED**. The Court orders the appeal **DISMISSED** in accordance with its opinion, that the appellant pay all costs expended in this appeal, and that this decision be certified below for observance.

contentions at the video hearing.

Section 14.003(c) of the Texas Civil Practice and Remedies Code provides:

> (c) In determining whether [to dismiss a suit under section 14.003], the court *may* hold a hearing. The hearing may be held before or after service of process, and it may be held on motion of the court, a party, or the clerk of the court.

TEX. CIV. PRAC. & REM. CODE ANN. § 14.003(c) (Vernon Supp. 2001) (emphasis added).

The plain language of the statute indicates that the court's determination to hold a hearing is discretionary. *See Thomas v. Wichita General Hosp*., 952 S.W.2d 936,938 (Tex.App.-Fort Worth 1997, pet. denied). Thus, it was not mandatory that the court conduct a hearing to decide whether appellant's suit should be dismissed. *Id.* Moreover, appellant does not contend that there is evidence he would have presented had a hearing been held. We overrule appellant's point of error one.

In point two, appellant contends failure to hold a hearing on the merits denies him of

"fundamental due process." Appellant seems to complain that the trial court violated his constitutional rights by failing to grant him a hearing in which he could present his defenses and be heard to argue facts and the law.

While the state Constitution refers to "due course" rather than "due process," the terms have no meaningful distinction. *See University of Tex. Med. Sch. of Houston v. Than*, 901 S.W.2dd 926, 929 (Tex. 1995). In due process issues, Texas courts, while not bound by federal due process jurisprudence, have traditionally followed federal due process interpretations. *See id.* One federal court has found that under the Texas statute, it is malicious per se for an indigent inmate to file successive *in forma pauperis* suits duplicating claims made in other pending or previous suits. *See Hicks v. Brysch*, 989 F. Supp. 797, 822 (W.D. Tex. 1997). An inmate has no constitutionally protected right to file or pursue frivolous or malicious litigation. *See id.* Restrictions on the ability of inmates to proceed *in forma pauperis* do not implicate any constitutionally protected right per se. *See id.* Neither prisoners nor inmates constitute a suspect class. *See id.* Curtailing frivolous or malicious lawsuits, thereby protecting state judicial resources, is a legitimate state interest. *See id.*

Section 14.004 is designed to give courts the information needed to determine whether the claims the inmate seeks to litigate have previously been litigated or dismissed as frivolous. Requiring the inmate to provide such information violates no due process rights under either the state or the federal constitutions. We overrule appellant's point of error two.

In point five, appellant contends that the trial court "unjustly found" appellant's complaints "frivolous" without addressing the merits of any of his contentions at the video hearing. Appellant argues that the trial court did not fully consider the records in his case, and the records were "inadequate" to support its decision that his complaints were frivolous. Appellant seems to complain that the trial court had insufficient evidence before it to determine that his affidavit of previous filings failed to set out the necessary "operative

facts" of his previously filed lawsuits. He further contends that the trial court failed to consider what previous lawsuits his present case "was similar to." He further contends that the trial court terminated the hearing without allowing him the opportunity to address the deficiencies in his affidavit of previous filings.

Appellant's affidavit of previous filings lists seven previous claims filed in state courts and one filed in federal court. He indicated that three of the state claims were dismissed "without prejudice," and stated the status of the remaining four was "unknown." He did not furnish any information with respect to the previous complaint filed in federal court because the trial court had "no jurisdiction" over it. In his affidavit, appellant did not state "the operative facts for which relief was sought" as required by section 14.004(a)(2)(A) of the Texas Civil Practice and Remedies Code.

We review the trial court's dismissal of an inmate's lawsuit brought under Chapter 14 of the Texas Civil Practice and Remedies Code under an abuse of discretion standard. *See McCollum v. Mt. Ararat Baptist Church, Inc.*, 980 S.W.2d 535, 536 (Tex. App.–Houston [14th Dist.] 1998, no pet.). Under this chapter, a trial court has "broad discretion" to dismiss an inmate's suit if it finds that the claim is frivolous or malicious. *See artinez v. Thaler,* 931 S.W.2d 45, 46 (Tex.App.–Houston[14th Dist.] 1996, writ denied). Therefore, a trial court's dismissal of an action as frivolous or malicious is subject to review under an abuse of discretion standard.

Chapter 14's purpose is to reduce duplicative inmate litigation by requiring the inmate to identify previous litigation and its outcome. *See Bell v. Texas Dep't of Criminal Justice–Institutional Div.,* , 962 S.W.2d 156, 158 (Tex.App.–Houston[14th Dist] 1998, pet. denied). The trial court can determine, based on previous filings, whether the inmate has filed similar claims and whether the current suit is, therefore, frivolous. Here, based on appellant's failure to comply with section 14.004, the trial court was entitled to presume the current suit was frivolous or malicious and to dismiss the suit.

Appellant further complains that the trial court should have allowed him to correct

his affidavit before terminating the hearing and dismissing his case. We have previously held that because a trial court may dismiss an action as frivolous either before or after service of process, the trial court is under no duty to suggest or recommend that appellant amend his pleading. *See Kendrick v. Lynaugh*, 804 S.W.2d 153, 156 (Tex. App.—Houston [14th Dist.] 1990, no writ). We hold the same reasoning applies to defects in the affidavit. *See Hickman v. Adams*, 35 S.W.3d 120, 125 (Tex.App.–Houston[14th Dist.] 2000, no pet.). The trial court did not abuse its discretion in dismissing appellant's claims. We overrule appellant's point of error five.

ASSESSMENT OF COURT COSTS

In his third point of error, appellant contends that the trial court erred when it issued its order dated February 28, 2000, assessing his costs at $165.00. The court ordered the costs to be taken from appellant's inmate trust account as required by section 14.006, in the manner provided in that statute (set out above in the factual and procedural summary). The trial court further ordered that the "Clerk may not accept for filing any other lawsuit filed by the Plaintiff until the bill of costs assessed against plaintiff in this suit have been paid in full, except as provided by statute." This provision was expressly authorized by section 14.011, Civil Practice and Remedies Code.

Appellant asserts that the trial court refused to allow him to proceed *in forma pauperis* "without considering his declaration of inability to pay," and therefore, the trial court abused its discretion in assessing costs.

Under section 14.006, a "court may order an inmate who has filed a claim to pay court fees, court costs, and other costs. . . ." TEX. CIV. PRAC. & REM. CODE ANN. § 14.006(a) (Vernon 1986 & Supp. 2000). Sections 14.006, 14.007, and 14.011 specifically authorize the trial court to assess costs in these inmate claims such as appellant's. The trial court's orders complied with these statutes. *See Bonds v. Tex. Dept. of Criminal Justice*, 953 S.W.2d 233, 233 (Tex.1997) (per curiam). Other than citing cases relating to abuse of

discretion, appellant directs us to no authority suggesting that the trial court's assessment of costs was improper. TEX. R. APP. P. 38.1(h); *Barnum v. Munson, Munson, Pierce and Cardwell, P.C.*, 998 S.W.2d 284, 287 (Tex.App.-Dallas 1999, pet. denied). A point of error not supported by authority is waived. *Trenholm v. Ratcliff*, 646 S.W.2d 927, 934 (Tex.1983). Accordingly, we overrule appellant's third point of error to the extent he complains of the $165.00 in costs assessed against him.

DENIAL OF CONTINUANCE

In his fourth point of error, appellant contends the trial court abused its discretion by not granting him a continuance to obtain more information to complete his affidavit of previous filings. Although we find no express ruling denying appellant's request for a continuance, the trial court's order provides that it considered all "the pleadings and oral arguments" at the evidentiary hearing and dismissed "all claims" against the defendants. Thus, the trial court "implicitly" denied appellant's motion for continuance. *See* TEX. R. APP. P. 33.1(a)(2)(A); *Frazier v. Yu*, 987 S.W.2d 607, 610 (Tex.App.--Fort Worth 1999, pet. denied).

Rule 251, Texas Rules of Civil Procedure, provides:

> No application for a continuance shall be heard before the defendant files his defense, nor shall any continuance be granted except for sufficient cause supported by affidavit, or by consent of the parties, or by operation of law.

TEX. R. CIV. P. 251 (Vernon 1976 & Supp. 2001).

In his various motions and requests, appellant alleged he had some information and had to write home for it. He also contended that he needed injunctive relief against the defendants to return some unidentified legal papers. Appellant submitted no affidavit with his request for continuance showing "sufficient cause" for his request. As we understand his request and pleadings, he asked for more time to prepare his affidavit of previous filings. Nowhere in appellant's motions and pleadings is there any showing of what efforts he made to secure the missing information.

A trial court's action in granting or denying a motion for continuance will not be disturbed unless the record discloses a clear abuse of discretion. *See General Motors Corp. v. Gayle,* 951 S.W.2d 469, 476 (Tex.1997) (orig. proceeding); *State v. Wood Oil Distrib., Inc*., 751 S.W.2d 863, 865 (Tex.1988). Generally, when a movant fails to include an affidavit in support of his motion, the appellate court presumes the trial court did not abuse its discretion in denying the continuance. *See Villegas v. Carter*, 711 S.W.2d 624, 626 (Tex.1986); *see also Rent Am., Inc. v. Amarillo Nat'l Bank*, 785 S.W.2d 190, 193 (Tex.App.--Amarillo 1990, writ denied) (failure to comply with rule 251 results in presumption that trial court did not abuse its discretion). Because appellant's requests and pleadings contain no supporting affidavit, we presume the trial court did not abuse its discretion.

In addition, a court will not be required to grant a continuance when the allegations in the motion, examined in light of the record, show a complete lack of diligence. *See Fritsch v. J.M. English Truck Line, Inc*., 151 Tex. 168, 246 S.W.2d 856, 858-59 (1952). Here, the record is devoid of any indicia of diligence on the part of appellant to secure the missing information or of a reason so compelling to justify a continuance. *Southwest Country Enterprises, Inc. v. Lucky Lady Oil Co.,* 991 S.W.2d 490, 493 (Tex.App.-Fort Worth 1999, pet. denied). Appellant's fourth point is overruled.

DISMISSAL FOR FAILURE TO FILE SECTION 14.004 AFFIDAVIT

In his sixth point of error, appellant contends the trial court erred in dismissing his claim with prejudice. Appellees did not file a brief. The factual basis for the trial court's dismissal was appellant's failure to furnish the operative facts of his previous lawsuits in his affidavit of previous filings. Appellant does not dispute these facts. In *Hickman v. Adams*, we addressed this exact issue. 35 S.W.3d at 123. There we held that the trial court erred in dismissing the plaintiff's claims with prejudice since a dismissal based on failure to furnish the operative facts of previous lawsuits is not a dismissal on the merits. *Id.* at 124. We follow that decision, and hold the trial court erred in dismissing this case with prejudice.

We modify the trial court's judgment to delete the words "with prejudice."

CONCLUSION

The trial court's order of dismissal is reformed to delete the words "with prejudice," and as modified, the order is affirmed.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed September 20, 2001.

Panel consists of Justices Yates, Fowler, and Wittig.

Do Not Publish — TEX. R. APP. P. 47.3(b).